BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation Provisions	)	
Of the Telecommunications Act of 1996	)	
	)	
The Illinois Public Telecommunications Association's	)	
Petition for A Declaratory Ruling Regarding the Remedies	)	
Available for Violations of the Commission's Payphone	)	
Orders	)	

COMMENTS OF THE INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.

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The Independent Payphone Association of New York, Inc. (IPANY) , pursuant to the Public Notice released on August 6, 2004 (DA 04-2487), respectfully submits the following comments on the Petition of the Illinois Public Telecommunications Association (IPTA) for a Declaratory Ruling regarding the remedies available for violation of the Commission's Payphone Orders. As discussed below, IPANY urges the Commission to grant the relief requested by IPTA in the form of both the specific Declaratory Ruling sought with respect to the rights of PSPs in Illinois, as well as in a generally applicable Declaratory Ruling that PSPs in all states are entitled to refunds, back to April 15, 1997, where RBOCs fail to comply with the New Services Test. Both forms of relief are fully supported by long-standing principles of regulatory law; the RBOC promises to make refunds to PSPs, contained in the RBOC Coalition letters of April 10 and 11, 1997; and the codification of those promises in the Commission's Refund Order of April 15, 1997.[1]

I. INTRODUCTION AND SUMMARY

The Independent Payphone Association of New York, Inc. (IPANY) is the trade association representing independent owners and operators of public pay telephones (PSPs) in the state of New York. For more than seven years, IPANY and its individual members have been vigorously prosecuting proceedings before the New York State Public Service Commission (PSC), and the New York State courts, in an effort to obtain New Services Test (NST) compliant rates, and to obtain refunds because of Verizon New York's (Verizon) refusal to establish NST-compliant rates in accordance with this Commission's Orders. IPANY files these comments because its members, like the PSPs in Illinois, have been stymied in their efforts to obtain the refunds which this Commission intended be made available.

At stake here is the very integrity of this Commission's regulatory process. The Commission required the local exchange carriers to provide payphone rates that complied with the Commission's new services test by April 15, 1997. Additionally, the Commission made the actual provision of these rates a condition precedent for the local

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[1] In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket 96-128, ORDER, April 15, 1997, DA 97-805 (Refund Order).

exchange carriers to be eligible to receive Dial-Around Compensation for their payphones. The RBOCs made an unequivocable, unambiguous, and binding commitment to this Commission, and to PSPs across the country, to give refunds, back to April 15, 1997, if their existing underlying payphone rates were subsequently found not to be in compliance with the NST. Those promises for refunds, contained in the two RBOC commitment letters of April 10 and 11, 1997, were specifically codified, as a matter of binding federal law, by this Commission in its Refund Order.[2]

Permitting the RBOCs to renege on their obligations, and thus allowing them to unjustly enrich themselves by retaining hundreds of millions of dollars in Dial-Around revenues, will severely undermine the integrity and credibility of this Commission's regulatory processes.

The RBOCs did not offer to make refunds to PSPs out of the goodness of their hearts, but rather for a very self-serving reason. They desperately wanted to participate in the federal Dial-Around Compensation Program, under which they would be entitled to receive the Dial-Around payments from long distance companies.

The pre-requisite for receiving those payments was that the BOC's payphone tariffs first had to be in actual compliance with the NST. But the RBOCs didn't want to wait, so they proposed a bargain: If they were permitted to immediately begin receiving Dial-Around, they would promise to correct non-complying payphone

[2] The April 10 and 11 RBOC commitment letters are attached to these Comments.

service rates, and be liable for refunds to PSPs until the corrections were made. In this manner, the RBOCs could begin collecting Dial-Around Compensation from April 15, 1997, while the payphone providers would effectively receive the benefit of cost-based rates back to that date.

It was a pretty good deal: the Dial-Around monies received dwarfed the potential liability for NST refunds to PSPs. And it became an even better deal when the RBOCs breached their commitments to the Commission and the PSPs by refusing to change their tariffs or to make the promised refunds.

By making the <u>promise</u> to modify their tariffs to become NST compliant, and by <u>promising</u> to make refunds for rates which exceeded NST-compliant rates, the RBOCs immediately began to receive hundreds of millions of dollars in Dial-Around compensation. But then, and now, having received those monies, the promises ring hollow, the commitments are nullified, and the memories have become exceedingly selective. Such unprecedented bad faith, and attempted manipulation of this Commission, cannot be tolerated.

As described below, PSPs in New York find themselves in a parallel situation to PSPs in Illinois. In New York, PSPs have been diligently trying, since early 1997, to obtain NST-compliant rates from Verizon New York, but have been frustrated at every turn. Despite the duty to re-file payphone rates which comply with the NST, the clear meaning and enforceability of the RBOC commitment letters, and the explicit terms of the Refund Order, New York has refused to require NST-compliant rates or to enforce the RBOC duty to make refunds. Thus, the situation in Illinois, where the refund obligation is being disavowed, is not unique, but is unfortunately typical of numerous state jurisdictions which refuse to comply with the binding orders of this Commission.

II. HISTORY OF THE NEW YORK PROCEEDINGS

PSPs in New York have been trying since the beginning of 1997 to have the New York State Public Service Commission (PSC) establish Verizon's rates for underlying payphone services in accordance with this Commission's New Services Test. Despite continuous and diligent efforts, there has never been any change to the pre-existing, non-compliant, and excessive Verizon rates in New York, which the PSC has inexplicably defended on the ground they are based on embedded costs.[3]

On December 31, 1996, in response to the Commission's initial Payphone Orders, Verizon (then known as New York Telephone Company) filed revisions to certain of its underlying payphone tariffs with the New York PSC, generally addressing only the rates for the "smart payphone lines" utilized by Verizon's "dumb" payphones. IPANY submitted objections to the PSC, on the ground no changes were being proposed to the "dumb" payphone line tariffs, which had been in effect for many years, which were used

[3] As described below, New York Courts have found the PSC's approval of these pre-existing rates to be improper, and have ordered a remand to the PSC. However, as of today, the original rates are still being charged. See IPANY v. PSC, New York Supreme Court, Albany County, Index No. 413-02.

by PSPs for their "smart" payphones.[4]

On May 19, 1997 Verizon filed revisions with the PSC to its intrastate payphone tariffs which it described as being necessary to bring its rates into compliance with the New Services Test. Critically, Verizon cited this Commission's April 4, 1997, Bureau Waiver Order, and the April 15, 1997, Refund Order, as authority for the filing. A subsequent tariff filing, made on July 21, 1997, also cited the New Services Test and the Bureau Waiver Order as its authority.

IPANY filed objections to the filings with the PSC, and asked that Verizon be required to provide its cost studies for all payphone services, so that the Commission could review whether Verizon's rates for all other payphone services were in compliance with the New Services Test.

In light of the tariff filings and IPANY objections, on July 30, 1997, the PSC issued an Order seeking comments from interested parties on the validity of Verizon's underlying payphone rates, and whether they complied with federal law.[5] In response thereto, IPANY submitted formal comments which showed that Verizon's rates were excessive and unlawful, and urged the PSC to require Verizon to amend its tariffs so

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[4] Verizon and other RBOC payphone services generally utilized "dumb" telephone instruments and "smart" access lines. In contrast, competing PSPs use "smart" telephone instruments and "dumb" access lines.

[5] Cases 96-C-1174 and 93-C-0142, Notice Requesting Comments Addressing Aspects of the Federal Payphone Regulations, the Need for Changes to the Commission's COCOT Regulations and Certain LEC Payphone Tariffs, July 30, 1997.

that its rates complied with the NST's forward looking, direct cost methodology.

The PSC kept its proceeding on Verizon's payphone rates open, but took no action, for two years. Accordingly, on December 2, 1999, in an attempt to "jump start" the moribund proceeding, IPANY filed a Petition with the PSC which urged it to take final action with respect to the pending review of Verizon's tariffs; to declare the pre-existing tariffs unlawful; and to order refunds. In support of that petition, IPANY demonstrated, through the affidavit of its expert, that Verizon's pre-existing rates were established using an embedded cost standard, rather than the forward-looking, direct cost standard mandated by the NST. Among other things, IPANY argued the NST rules required that credit be given for the EUCL charge; that the NST be applied to usage (as well as to line charges); and that the excessive overhead allocations utilized by Verizon were improper.

While the PSC proceeding was underway, and before the PSC issued a decision, the Common Carrier Bureau issued its Order of March 2, 2000 in Docket CCB/CPD No. 00-1, the Wisconsin Payphone Proceeding ("the CCB Order"). IPANY immediately brought that Order to the attention of the PSC, and urged the PSC to follow the instructions of the Common Carrier Bureau and, among other things, take into account the EUCL charge, apply the NST to usage, and limit the overhead allocations which could be utilized.

Verizon fiercely opposed following the requirements of the CCB Order, alleging that the methodology it described applied only to the LECs in the State of Wisconsin.[6] Inexplicably, the PSC bought that argument, and issued an Order on October 12, 2000, which refused to apply the instructions of the CCB Order; found that Verizon's pre-existing "dumb payphone line" rates lawfully complied with the NST; and rejected the relief sought by IPANY.[7] Amazingly, the PSC defended Verizon's rates on the ground they reflected "direct embedded costs plus a reasonable contribution toward common costs and overheads."[8]

IPANY submitted a Petition for Rehearing, again emphasizing that the PSC was bound to follow the methodology set forth in the CCB Order, because the NST was a nationally applicable standard and not limited to Wisconsin. The PSC refused to change its opinion, and on September 21, 2001, issued an Order Denying Rehearing.

IPANY promptly sought judicial review of the PSC Order through an Article 78 proceeding initiated in the State Supreme Court (the trial level court).

While this matter was pending before the trial court, this Commission

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[6] Verizon also erroneously claimed, either deliberately or out of ignorance, that the CCB Order, which had been issued under Delegated Authority, was stayed and of no effect because the RBOCs were appealing to the full commission. That, of course, was not true. See 47 CFR §1.102(b)(3).

[7] Because the PSC found Verizon's rates to be in compliance with the NST, it found no reason to award refunds.

[8] PSC Order of October 12, 2000, Cases 99-C-1684 and 96-C-1174, at page 6. The actual overhead ratios sanctioned by the PSC provided for recovery of at least $17.26 above the total, unseparated direct cost of the dumb payphone line of $14.99, and up to 400% above the direct cost of usage.

issued its Wisconsin Order on January 31, 2002.[9] That Order was immediately brought to the attention of the Court, and cited by IPANY as upholding many of the findings and requirements of the CCB Order. Despite its clear relevance to the pending issues, the PSC and Verizon urged the Court to ignore the Wisconsin Order, which, unfortunately, it did, on the ground the Order was issued after April 15, 1997. That did not, however, prevent the Court from holding the PSC had erred in approving Verizon's rates.

Even without considering the holdings of the Wisconsin Order, the Court was able to hold, based on the earlier Payphone Orders, that the PSC had acted improperly in approving Verizon's pre-existing rates, since they were defended by the PSC as reflecting "direct embedded costs plus a reasonable contribution towards common costs and overhead", while the NST clearly required use of a forward looking, direct cost methodology. A remand was ordered by the Court to properly evaluate Verizon's rates against the NST standards.

The trial court also ruled, as IPANY had urged, that under the RBOC Coalition letters of April 10 and 11, 1997, and the Refund Order, Verizon could be liable for refunds if the correct NST-compliant rate established by the PSC, after the remand proceeding, were less than the pre-existing rates as of April 15, 1997.

While IPANY approved the result ordered by the Court, i.e., a remand to

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[9] In the Matter of Wisconsin Public Service Commission, Order Directing Filings, Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, January 31, 2002 ("Wisconsin Order").

the PSC to set NST-compliant rates, and establishing the potential liability for refunds, it disagreed with the criteria which the Supreme Court argued should be applied by the PSC in determining an NST-compliant rate as of April 15, 1997. Specifically, at the urging of the PSC and Verizon, the Supreme Court declared that since the CCB Order of March 2, 2000, and the Wisconsin Order of January 31, 2002, had been issued after April 15, 1997, they should not be considered by the PSC in determining a proper NST rate as of April 15, 1997.

Both IPANY and Verizon appealed the Supreme Court decision to the Appellate Division. IPANY argued that the CCB Order and the Wisconsin Order were interpretative orders which gave further guidance on how the long-standing NST test was to be applied, and accordingly should be followed by the PSC when establishing correct NST rates.

Verizon argued on appeal that neither the RBOC commitment letters, nor the Refund Order, required it to make refunds because Verizon never filed any revisions to its pre-existing, non-compliant rates. Thus, Verizon was so bold as to assert that since it never bothered to file NST-compliant rates, it had not taken advantage of the waiver granted in the Refund Order, and accordingly, Verizon had no obligation to make refunds, notwithstanding the fact it had enjoyed millions upon millions of dollars of Dial-Around compensation since April 15, 1997.[10]

The Appellate Division of the State Supreme Court issued a Decision on March 25, 2004, which was devastating to the PSPs in New York. It held the PSC had no duty to follow the methodology set forth in the CCB Order and Wisconsin Order. Furthermore, it held this Commission's Refund Order did not apply to Verizon, because it had not filed corrective tariffs within the 45 day extension specified in the Refund Order. Furthermore, the Appellate Court held that even if refunds were allowed, the maximum period of liability for refunds could be only 45 days, regardless of how long it took to replace Verizon's unlawful rates with NST-compliant rates. In other words, by stalling, denying reality, gaming the regulatory process, and refusing to honor its commitment to file NST-compliant rates, Verizon would be freed from its moral and legal duty to pay refunds.

Under New York law, IPANY was not automatically entitled to prosecute a further appeal from the Appellate Division's decision. Accordingly, on July 2, 2004, IPANY filed a motion with the New York Court of Appeals for leave to appeal from the Appellate Division decision , and a determination on that motion remains pending.[11]

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[10] Verizon was factually wrong in its claim it had not taken advantage of the 45-day waiver. As indicated above, it did file tariff revisions with the PSC on May 19, 1997 (and again on June 21, 1997), which it declared were being filed under authority of the Bureau Waiver Order and the Refund Order, and were required to make its rates NST compliant.

[11] The pending motion is akin to a request for a writ of certiorari. If granted, IPANY will perfect its appeal and the parties will brief the issues.

Unfortunately, there is a distinct possibility, as in Illinois, that the final determination in New York will be that this Commission never intended or required that Verizon be liable for refunds - an outcome which would undercut this Commission's regulatory regime and have devastating consequences to the entire PSP industry in New York and around the country.

III. THIS COMMISSION SHOULD NOT PERMIT STATES TO OVERRIDE AND IGNORE THIS COMMISSION'S ORDERS AND THE NATIONAL POLICY ESTABLISHED IN THE TELECOM ACT OF 1996

Congress passed §276 of the Telecom Act "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public". 47 USC §276(b)(1). In interpreting §276, this Commission has highlighted "Congress' stated intent to preserve the availability of payphones [and] the universal service functions payphones provide." Order on Reconsideration, CC Docket 96-262 and 94-1, 11 FCC Rcd. 21233, November 8, 1996, at para. 8.

This Commission has continued to implement the requirements of §276, including its efforts to ensure that payphone providers are fairly compensated for calls placed from their facilities. Thus, the Commission recognized, as did Congress in passing §276, that payphones should be accessible on demand to consumers, and that they "provide a unique back-up communications option when subscription services - whether wireline or wireless - are unaffordable or unavailable" and that "payphone services are particularly critical to those with few other communications service options - including low-income customers, the elderly, and residents of rural areas." Critical to public policy, the Commission affirmatively stated "Payphones also enhance access to emergency (public health and safety) services." Dial-Around Update Order, at para. 20.[12]

The RBOCs have unfortunately been successful in having states issue decisions in direct conflict with those policies, and directly counter to this Commission's requirements for refunds, by putting forth arguments which cannot pass the red-faced test. Among these are the following:

1. The RBOC commitment letters of April 10 and 11, 1997, did not constitute binding commitments made by the RBOCs to this Commission, and to PSPs, to make refunds back to April 15, 1997, in the event pre-existing payphone rates were subsequently determined not to be in compliance with the NST;
2. The Commission's Refund Order (a) imposed a refund requirement on RBOCs only if they filed tariff revisions within a 45 day period ending on May 19, 1997 and (b) established a maximum period of time during which refunds might be applicable at 45 days;
3. The RBOC commitment to make refunds, as codified in the April 15, 1997

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[12] In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones, WC Docket 03-225, Report and Order, FCC 04-182, August 12, 2004 ("Dial-Around Update Order").

Refund Order, had no relationship to the RBOCs' immediate entitlement to Dial-Around compensation, and that RBOCs would be entitled to receive and retain Dial-Around compensation even if they deliberately chose to keep in effect rates they knew did not comply with the NST; and

4. Granting refunds back to April 15, 1997, would constitute unlawful "retroactive ratemaking."

This Commission should use the IPTA Petition as an opportunity to declare that those assertions are wholly baseless and without merit. To the extent that states have been beguiled by the RBOCs, and have refused to implement this Commission's unequivocal requirement that refunds be made available where RBOCs have refused to file NST-compliant tariffs, such rulings should be pre-empted as inconsistent with the mandates of Congress and the policies adopted by this Commission.

IV. THIS COMMISSION SHOULD SPECIFY, IN NO UNCERTAIN TERMS, THAT FEDERAL LAW, AS MANDATED BY CONGRESS AND THIS COMMISSION, REQUIRE THAT REFUNDS BE AVAILABLE TO PSPs WHERE RBOC RATES ARE DETERMINED NOT TO COMPLY WITH THE NEW SERVICES TEST

The IPTA Petition sets forth a thoughtful, complete and accurate analysis of why, according to U.S. Supreme Court precedents, the RBOC non-compliant payphone tariffs were never lawful rates, and accordingly PSPs are entitled, as a matter of law, to refunds. IPANY endorses those legal arguments and urges their acceptance by this Commission.

But IPANY believes additional authority - both legal and equitable - require this Commission to enforce the RBOC refund obligation.

The enforceability of the RBOC commitment letters, codified in the Commission's Refund Order, cannot be understood in a vacuum, but must be evaluated in the context of the background leading to their issuance.

As discussed at the outset, the RBOCs did not promise to give refunds to PSPs out of the goodness of their hearts, but rather for a very self-serving reason. The RBOCs were salivating over the possibility they could receive hundreds of millions of dollars in Dial-Around compensation. However, this Commission made clear the RBOCs would not be entitled to receive those monies until their underlying payphone tariffs were deemed to be in actual full compliance with the New Services Test. But the RBOCs did not wish to wait the months (or even years) it might take for state commissions to review the existing rates and determine whether or not they were NST-compliant. Accordingly, the RBOCs were able to entreat this Commission into allowing them to immediately begin receiving Dial-Around compensation on April 15, 1997, rather than having to wait for state certifications of NST compliance. To induce this Commission to grant that largesse, they promised that, if RBOC existing rates were eventually found not to comply with the NST, refunds would be given to PSPs, back to April 15, 1997, of the difference between the existing rates and the subsequently effective lower NST-compliant rates.

This Commission, believing the RBOCs were acting from honorable intentions, accepted that promise, at face value, in good faith. But it is now clear the RBOCs never intended to honor their obligation. Inexcusably, after engorging themselves on hundreds of millions of dollars of Dial-Around Compensation, many of the RBOCs have shown their utter disregard and contempt for this Commission, and its regulatory process, by refusing to honor their side of the bargain. Rather than respecting this Commission, those RBOCs have made a mockery of its processes.

Such conduct simply cannot be tolerated. If unanswered, it would undermine the ability of this Commission to perform many of its regulatory functions, during which commitments are made, with administrative determinations or actions taken under an expectation such commitments will be honored.

The RBOC Coalition letters were originally generated by the alleged "misunderstanding" by the RBOCs on whether the Commission's NST Orders applied to previously-tariffed intrastate payphone services. But once they "understood" the clear meaning of the Commission's <u>Bureau Waiver Order</u> of April 4, 1997, the RBOCs acknowledged that in some states "there may be a discrepancy between the existing state tariff rate and the 'new services' test; as a result, new tariff rates may have to be filed." RBOC Coalition Letter, April 10, 1997, p. 1.

Accordingly, the RBOCs asked for additional time to file NST-compliant tariffs on the state level, and also asked they be entitled to receive Dial-Around Compensation immediately. To induce the Commission to grant that request, they promised, without reservation, that

> "Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997."

Letter of Michael K. Kellogg, Counsel to RBOC Payphone Coalition, to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau, April 10, 1997, at p. 2.

The commitment to pay refunds was reaffirmed in the second RBOC Coalition letter of April 11, 1997:

> "The waiver will allow LECs 45 days (from the April 4 Order) to gather the relevant cost information and either be prepared to certify that the existing tariffs satisfy the costing standards of the 'new services' test or to file new or revised tariffs that do satisfy those standards. Furthermore, as noted, where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with State requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs."

The RBOC Coalition letters contained no conditions to the refund commitment. There was no condition which would allow refunds to be made only if the RBOCs voluntarily decided to file tariff changes within the 45 day waiver period. There was no statement limiting the time by which pre-existing tariffs would have to be determined to be non-NST compliant in order for refunds to be made. There was no statement that, where refunds were appropriate, the maximum refund exposure would be only for 45 days.

The RBOC commitments were codified, as a matter of law, in the Refund Order:

> "A LEC who seeks to rely on the waiver granted in the instant order must also reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates."

Refund Order, paras. 20 and 25.

Before various state commissions, RBOCs have put forth the outlandish argument that, if they never filed "newly tariffed rates" within the 45 day time extension, they did not "rely" on the waiver, and could never be liable for refunds, even though they received Dial-Around payments and even though their pre-existing rates failed (and continue to fail) to comply with the NST standards.

In support of this claim, the RBOCs have asserted the language in the last paragraph on page 2 of the April 10 RBOC letter pre-conditions their refund liability on their actually making a tariff filing during the 45 day extension. That claim is untenable. It is true that clause (3) states that "in the event the LEC files a new tariff rate to comply with the 'new services' test", and that rate is lower than the previous tariff, the LEC will provide a credit. However, that phrase cannot (as the RBOCs would like) be taken out of context, but must be read in conjunction with the immediately preceding language. Immediately before clause (3), clause (2) states that "where a LEC's state tariff rate does not comply with the 'new services' test, the LEC must file a new state tariff rate that does comply within the 45 days..." (emphasis added). Thus, where the pre-existing rate was non-NST compliant, the RBOC had an absolute duty to file a new, NST-compliant rate. Failure to comply with that duty cannot be used as a boot-strapping excuse to escape liability for refunds.[13]

The reason this Commission referred to "newly tariffed rates" in the Refund Order is that the RBOCs had also promised the FCC that, if their pre-existing tariffs did not comply with the NST, they would promptly file such "newly tariffed rates":

> "It [the RBOC] further argues that, in some states, there may be a discrepancy between the existing state tariff rates and state tariffs that comply with the New Services Test, which

[13] And, as the IPTA Petition points out, failure to comply with that duty also invalidates the RBOC's right to receive and retain Dial-Around Compensation.

would require the LEC to file new tariff rates... The RBOC Coalition argues that this 45-day period would allow the LECs to file new intra-state tariffs in the states where it is necessary without delaying its eligibility to receive compensation." Refund Order, para. 14. (emphasis added).

Thus, the language in the Refund Order reflected the commitment in the April 10 RBOC Coalition letter that the RBOCs would "undertake and follow-through on our commitment to ensure that existing tariff rates comply with the 'new services' test and, in most states and for those services where the tariff rates do not comply, to file new tariff rates that will comply..." (emphasis added).

Under the unsustainable RBOC interpretation of the Refund Order, an RBOC which conscientiously complied with its obligations under Federal law, properly evaluated its pre-existing tariff, determined the tariff did not meet the NST standards, and responsibly filed a replacement tariff within 45 days, would be liable for refunds. In contrast, according to the RBOCs, a recalcitrant RBOC, fully recognizing that its pre-existing tariff did not meet the NST standard, but arrogantly refusing to file an appropriate tariff which met the required standards, would be permanently immunized from making any refunds. That argument makes absolutely no sense.

The purpose of the Refund Order was not to reward recalcitrant RBOCs, which ignored their obligations under Federal law, and refused to file replacement tariffs which met the NST standards. To the contrary, the purpose of the Refund Order was to assure that RBOCs would be penalized if they failed to promptly replace their non-compliant tariffs, and to assure PSPs would not be harmed or prejudiced by any delay in the filing of replacement tariffs.

The New York Supreme Court agreed that Verizon's argument was totally without merit on two separate occasions:

> "The Court further finds that the terms of the April 10, 1997 [RBOC Coalition] letter and the April 15, 1997 [Refund] Order did not require that Verizon actually revise its tariffs in order to subject it to the requirement of issuing refunds or credits, but that Verizon was required to issue refunds or credits if it was eventually determined that it should have reduced its tariffs. In addition, the letter dated May 19, 1997 [to the PSC] demonstrates that Verizon did take advantage of the FCC's limited waiver by taking additional time to review its existing rates, despite the fact that it did not ultimately change its previously-filed tariffs."

Initial Decision and Order of Hon. Leslie Stein, Justice of the Supreme Court, IPANY v. PSC, July 31, 2002, at mimeo, p. 21 (emphasis in original).

And, as Justice Stein reconfirmed, in denying Verizon's claim that no refunds were possible:

> "The interpretation urged by Verizon would have the result that, so long as Verizon properly identified those pre-existing rates, which required modification in order to comply with the New Services Test and made such modifications by May 19, 1997, Purchasers would be entitled to refunds to the extent that the modified rates were lower than the pre-existing rates. However, in the event that Verizon did not properly identify those pre-existing rates which required modification - intentionally or unintentionally - no refunds would be due even if the PSC (or the Court) ultimately determined that the pre-existing rates failed to comply with the New Services Test and, therefore, <u>should have been</u> modified by May 19, 1997. (emphasis in original). Stated otherwise, Verizon would be rewarded for failing to properly identify those pre-existing rates which did not comply with Federal law. <u>This interpretation is illogical. Furthermore, the language pointed to by Verizon actually supports the interpretation adopted by this Court that refunds would be due at such time as new tariffs in compliance with the New Services Test actually took</u>

effect." (emphasis added).

Decision Denying Rehearing, issued by Supreme Court Judge Leslie E. Stein, IPANY v. PSC, April 22, 2003, at mimeo, p. 7.

Regrettably, Judge Stein's sound conclusions were reversed by the Appellate Division. That does not mean, however, that Judge Stein was wrong; indeed, logic makes clear she was correct. But ultimately, the proper authority on what the Refund Order required is not the Appellate Division, but this Commission which should, as requested in the IPTA Petition and herein, assert its authority and pre-empt state determinations in conflict therewith.

V. REFUNDS ARE NOT LIMITED TO THE 45-DAY WAIVER PERIOD

The RBOCs, like Verizon in New York, are arguing that, even if refunds were required, the maximum exposure would be for the 45 days during the waiver period. That argument is also without merit.

It is simply incorrect to suggest that the "limited" waiver granted to the RBOCs in the Refund Order, which extended until May 19, 1997, the time by which they were required to have in place intrastate tariffs in compliance with the NST, limits refund liabilities solely to the 45 day waiver period.

The language of the Refund Order stating that the "waiver...is for a limited duration" had nothing to do with limiting the period for which RBOCs would be liable for refunds. Instead, the "limited duration" referred only to the brief extension, until May 19, 1997, to file correct tariffs. After that date, pre-existing rates not in conformance with the

New Services Test would be deemed in violation of federal law, and subject the RBOCs to serious penalties and enforcement actions, as well as to refunds for charging unlawful rates.

To hold that an RBOC's maximum possible liability was for forty-five days, which is only the blink of an eye in regulatory time, regardless of the deliberate and continuing violation of federal law, would totally undermine the strong public policy of holding common carriers to their legal obligations - to say nothing of undercutting the rights of the PSPs to recover damages by virtue of an RBOC's continued violation of federal law.

It was never contemplated by this Commission, the PSPs, or the RBOCs that review of pre-existing RBOC "self certified" rates, or even re-filed rates, could be accomplished by all state commissions within forty-five days. The RBOC coalition recognized this in its April 10, 1997 letter by stating "Unlike with federal tariffs, there is of course no guarantee that the states will act within 15 days of these new tariff filings...".

The very nature of public utility ratemaking, which frequently involves formal preparation of cost studies, discovery, evidentiary hearings, and written briefs, requires many months of litigation. In such cases, where, as here, a Regulatory Order made rates subject to refunds, refunds are applied as of the commencement of the proceeding. This is why the RBOCs committed to - and the FCC ordered - a refund period running back to April 15, 1997, from whenever proper rates were finally put into effect.

That the “limited waiver” requested in the RBOC letter of April 10 dealt only with filing deadlines is evident from the specific request that this waiver be identical to another waiver granted by the Commission only six days earlier.

On April 4, 1997, in the Bureau Waiver Order,[14] the Commission had earlier granted a “limited waiver” extending the time for the RBOCs to file NST compliant interstate tariffs. That “limited waiver” for interstate tariffs had nothing whatsoever to do with refunds, or with any "window" during which refunds might be available. It dealt only with extending tariff filing dates.

The April 10, 1997 RBOC Coalition letter requested a similar “limited waiver” for intrastate tariffs, and specifically asked that “the limited waiver” issued by the Commission on April 4 for interstate tariffs also apply to intra-state payphone tariffs as well. As the April 10 RBOC letter states, on page 2:

> “We propose that the limited waiver issued by the Commission on April 4 for interstate tariffs apply to intrastate payphone tariffs as well. Specifically, we request that the Commission grant us 45 days from the April 4 Order to file new intra-state tariffs, in those states and for those services

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[14] Order, DA 97-678, 12 FCC Rcd. 20997, Common Carrier Bureau, April 4, 1997 (“Bureau Waiver Order”).

where new tariffs are required."

The RBOCs never asked the FCC to limit the time frame during which a refund liability would exist. Accordingly, the "limited waiver" granted by the FCC in the Refund Order had the same purpose as the "limited waiver" granted in the April 4 Bureau Waiver Order. It merely extended the deadline to file NST-compliant tariffs for a short period of time, and in no way established any "limited period" during which refunds would be calculated.[15]

VI. REQUIRING REFUNDS WILL NOT CONSTITUTE UNLAWFUL RETROACTIVE RATEMAKING

As discussed at the outset, the IPTA Petition correctly analyzes the applicable legal principles and demonstrates that requiring the RBOCs to give refunds, back to April 15, 1997, would not constitute unlawful retroactive ratemaking or violate the Filed Tariff Doctrine. IPANY fully endorses, and joins in, that analysis.

Furthermore, this Commission's issuance of its April 15, 1997, Refund Order precludes, as a matter of law, any claim of unlawful retroactive ratemaking.

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[15] In New York, Justice Stein again agreed with IPANY and dismissed Verizon's claim that refunds were limited to only 45 days:

> "This language merely applies to the limited time that Verizon was given to file revised tariffs to comply with the new services test and to the time given to the states to act on the tariffs filed, not to the period for which refunds might be given." Decision Denying Rehearing, IPANY v. PSC, April 22, 2003, at mimeo p. 8.

Even if the RBOC Coalition letters were not independently enforceable by the FCC as a contractual party, or by PSPs as third-party beneficiaries of that contractual promise (which they are), the terms of the Refund Order specifically create a refund liability, effective as of April 15, 1997, where pre-existing rates, or subsequently filed incorrect rates, did not comply with the legal requirements of the NST.

Accordingly, since April 15, 1997, there has been in continuous effect a binding Regulatory Order which has required, as a matter of federal law, that refunds be made available for the difference between the rates being charged by RBOCs as of that date and the lawful rates as and when finally approved. Thus, even if there were any question about applicability of the Filed Tariff Doctrine (which, as IPTA demonstrates is not applicable), any such question would be resolved in favor of refunds. When a regulatory agency specifically issues an Order subjecting rates to possible refunds, on a going-forward basis, any amounts collected by the utility after the effective date of that order are, as a matter of law, conditional, and if shown to have been improper, such rates are to be refunded in accordance with the terms of the Regulatory Order.

And, finally, even if there were an argument that the requirement for refunds was unlawful (which there is not), the RBOCs specifically waived their right to invoke that defense in the April 10, 1997 RBOC commitment letter. Therein, while the RBOCs noted what they claimed to be their rights under the Filed Tariff Doctrine, they specifically waived such rights and voluntarily undertook to provide rate adjustments back to April 15, 1997:

> "I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we [the RBOCs] can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance."

April 10, 1997 RBOC Coalition letter, at p. 2.

VII. CONCLUSION

The issue raised in the IPTA Petition is a matter of critical importance for the entire independent payphone industry. Granting the relief requested therein is essential to preserving the integrity of this Commission's regulatory process; to ensuring that RBOCs are not permitted to renege on their binding commitments; to preventing an enormous unjust enrichment to the RBOCs; and to assuring compliance with the national policy to "promote the widespread deployment of payphone services to the benefit of the general public."

In granting the IPTA Petition, this Commission should unequivocally declare that general principles of regulatory law, the RBOC Coalition letters, and the Commission's April 15, 1997 Refund Order, require that refunds be made available to PSPs in Illinois and other states where underlying payphone rates in effect on April 15, 1997, did not conform to the NST criteria, with such refunds to continue until rates recalculated to conform with the NST go into effect.

Respectfully submitted,

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